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No. 73-432

In the Supreme Court of the United States

OCTOBER TERM, 1973

ANTHONY ESPOSITO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statutes involved	2
Statement	2
Argument	3
Conclusion	14

CITATIONS

Cases:

Fong Foo v. *United States*, 369 U.S. 141	13
Perez v. *United States*, 402 U.S. 146	13–14
Turner v. *United States*, 396 U.S. 398	14
United States v. *Brewster*, 408 U.S. 501	13
United States v. *Ball*, 163 U.S. 662	12
United States v. *Darby*, 312 U.S. 100	13
United States v. *Findley*, 439 F. 2d 970	13
United States v. *Goldstein*, 479 F. 2d 1061, certiorari denied, No. 73–3, October 9, 1973	6
United States v. *Jorn*, 400 U.S. 470	10, 13
United States v. Lopez, 459 F. 2d 949	14
United States v. *Pecora*, C.A. 3, No. 72–2173, decided August 31, 1973	10
United States v. *Perez*, 402 U.S. 146	13
United States v. *Real*, 446 F. 2d 40	13
United States v. *Sisson*, 399 U.S. 267	5, 6, 7–8, 12, 13
United States v. *Weinstein*, 452 F. 2d 704, certiorari denied *sub nom. Grunberger* v. *United States*, 406 U.S. 917	13
United States v. *Whitted*, 454 F. 2d 642	13

Constitution, statutes and rules:

United States Constitution, Fifth Amendment (double jeopardy clause)	1, 10, 12, 13

527-893—73——1

Constitution, statutes and rules—Continued
Controlled Substances Import and Export Act, Title III, Pub. L. 91-513, 84 Stat. 1285, 1291, repealing the Narcotic Drugs Import and Export Act, 21 U.S.C. (1964 ed.) 174 — Page 14
Criminal Appeals Act, as amended, 18 U.S.C. 3731 — 1, 2, 3, 5, 6, 8
Omnibus Crime Control and Safe Streets Act of 1968, Title VIII, 82 Stat. 237, 18 U.S.C. (1964 ed., Supp. V) 3731 — 7
21 U.S.C. 801 — 14
21 U.S.C. 841 — 2, 3
Federal Rules of Criminal Procedure:
Rule 12(b)(1) — 4
Rule 29(b) — 12
Rule 34 — 4
Miscellaneous:
4 Blackstone, *Commentaries* (Lewis ed., 1900) — 4
H. Conf. Rep. No. 91-1768, 91st Cong., 2d Sess — 10
S. Rep. No. 91-1296, 91st Cong., 2d Sess — 6, 8-9, 10

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OPINION BELOW

The opinion of the court of appeals is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1973. A petition for rehearing was denied on August 6, 1973 (Pet. App. 13). The petition for a writ of certiorari was not filed until September 6, 1973, and was accordingly out of time under Rule 22(2) of this Court.

QUESTIONS PRESENTED

1. Whether the government was barred by 18 U.S.C. 3731 or the double jeopardy clause of the Fifth Amendment from appealing a decision of the district court, denominated as an order in "arrest of judgment," which sustained a defense to the indictment.

2. Whether Congress could rationally find that it was empowered to regulate intrastate transactions in cocaine on the ground that such transactions affect interstate commerce.

STATUTES INVOLVED

18 U.S.C. 3731 provides in part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> * * * * *
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

21 U.S.C. 841 provides:

> (a) *Unlawful acts.*
>
> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or * * *.

STATEMENT

Petitioner was found guilty by a jury in the United States District Court for the Northern District of Illinois on a two-count indictment charging possession with intent to distribute and distribution of cocaine, a controlled substance, in violation of 21 U.S.C. 841. The evidence which resulted in the jury's guilty verdict showed that petitioner provided a gov-

ernment informer with 206.5 milligrams of a substance later determined to consist of 47% cocaine.

After the jury's verdict was announced, the trial judge granted petitioner's motion for an order in "arrest of judgment," ruling that "Section 841 is not a valid exercise of congressional power and that the court therefore lacked jurisdiction over the alleged offense" (Pet. App. 10). The basis for the motion was that Section 841 did not require in each case a specific showing that the substance possessed or distributed was of interstate or foreign origin (Pet. App. 12). The United States appealed to the court of appeals, which reversed the district court and remanded the case for entry of judgment in accordance with the jury's verdict (Pet. App. 1).

ARGUMENT

1. Petitioner claims that the order of the district court, which the court of appeals held "was tantamount to the dismissal of an indictment" (Pet. App. 7), is not appealable under the Criminal Appeals Act (18 U.S.C. 3731), which authorizes an appeal to the court of appeals from "a decision, judgment, or order of a district court dismissing an indictment * * * except that no appeal shall lie where the double jeopardy clause * * * prohibits further prosecution."

Petitioner contends that an arrest of judgment cannot be "tantamount to the dismissal of an indictment" because "[a]n order arresting judgment is obviously different from one which dismisses an indictment * * * " (Pet. 8). The fact is, however, that the only distinction between the two orders is historical

and depends largely on the point in the proceeding at which a defense is raised.

The Federal Rules of Criminal Procedure provide two methods for challenging the sufficiency of an indictment or the jurisdiction of the court to try the offense. Pursuant to Rule 12(b)(1), a defendant may raise such a defense by motion prior to trial, which, if granted, results in the entry of an order dismissing the indictment. Such an order, as petitioner concedes, is clearly appealable.

When the same defense is raised after a guilty verdict has been returned, the traditional vehicle is by way of a motion in "arrest of judgment" pursuant to Rule 34, Fed. R. Crim. P. If the defense is sustained, it results in the entry of an order ending the prosecution in a manner indistinguishable from a dismissal. The different label is largely based on the early common-law procedure for raising post-trial defenses. As explained in 4 Blackstone, *Commentaries,* p. 1756 (Lewis ed., 1900):

> We are now to consider the next stage of criminal prosecution, after trial and conviction are past * * * which is that of *judgment.* For when, upon a capital charge, the jury have brought in their verdict guilty, in the presence of the prisoner, he is, either immediately, or at a convenient time soon after, asked by the court if he has anything to offer why judgment should not be awarded against him. And in case the defendant be found guilty of a misdemeanor (the trial of which may, and does usually, happen in his absence, after he has once appeared), a *capias* is awarded and issued

> to bring him in to receive his judgment; and, if he absconds, he may be prosecuted even to outlawry. But, whenever he appears in person, upon either a capital or inferior conviction, he may at this period, as well as at his arraignment, offer any exceptions to the indictment in *arrest* or stay of judgment; as for want of sufficient certainty in setting forth either the person, the time, the place, or the offence. And if the objections be valid, the whole proceedings shall be set aside; but the party may be indicted again. [Footnotes omitted.]

While this "venerable" procedure has been preserved in name and form under the Federal Rules of Criminal Procedure as a separate post-trial remedy (see *United States* v. *Sisson*, 399 U.S. 267, 281–282), there is no reasonable basis for declining to treat arrests of judgment "as tantamount to the dismissal of an indictment" for purposes of the Criminal Appeals Act. As the Court held in *Sisson* (*id.* at 279, n. 7):

> The label attached by the District Court to its own opinion does not, of course, decide for us the jurisdictional issue, however. "We must be guided in determining the question of appealability of the trial court's action not by the name the court gave [its decision] but by what in legal effect it actually was."

Moreover, the construction placed on Section 3731 by the court of appeals is compelled by that provision's language and history. Particularly pertinent here is the command of Section 3731 (omitted by petitioner from the "pertinent part" of the statute set

forth at pp. 2–3 of the petition) that "[t]he provisions of this section shall be liberally construed to effectuate its purposes." As the Senate Judiciary Committee Report (S. Rep. No. 91–1296, 91st Cong., 2d Sess., p. 18) states:

> The amended Criminal Appeal Act is intended to be liberally construed so as to effectuate its purpose of permitting the Government to appeal from dismissals of criminal prosecutions by district courts in all cases where the Constitution permits,[1] and from all suppressions and exclusions of evidence in criminal proceedings, except those ordered during trial of an indictment or information. S. 3132 places on the face of section 3731 an explicit expression of this intent, in view of the restrictive judicial interpretations of congressional intent which have resulted from the histories of the earlier versions of section 3731 despite strong indications in the debate on the 1907 act that it should be broadly interpreted.

See also *United States* v. *Goldstein*, 479 F. 2d 1061, 1065 (C.A. 2), certiorari denied, No. 73–3, October 9, 1973.

Petitioner attaches some significance, however, to the fact that the old Criminal Appeals Act specifically

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[1] There can, of course, be no claim that an appeal by the government from an order granting a motion in arrest of judgment violates the double jeopardy clause of the Constitution, since a successful appeal does not involve a retrial, but merely the entry of a judgment of conviction in accordance with the verdict of the jury. Indeed, appeals from such orders were entertained by this Court under the old Criminal Appeals Act. See *United States* v. *Sisson*, *supra*, 399 U.S. at 280–281.

referred to orders in arrest of judgment,[2] while the present act merely speaks of "decisions, orders and judgments" dismissing indictments. But one of the reasons for the change in wording was precisely because the "clear and well-settled distinction between * * * dismissal[s] of * * * indictment[s] and * * * arrest[s] of * * * judgment[s]" (Pet. 7) was never, in fact, readily discernible. Consequently Congress, prompted by this Court's decision in *Sisson*, deemed it advisable to eliminate distinctions as to common law categories of pleadings. As this Court noted in *Sisson*, 399 U.S. at 307–308:

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[2] The pre-1971 version of the Act reads as follows (18 U.S.C. (1964 ed., Supp. V) 3731):

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

"An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section."

> * * * [T]he Criminal Appeals Act is a failure. Born of compromise, and reflecting no coherent allocation of appellate responsibility, the Criminal Appeals Act [prior to the 1971 amendment] proved a most unruly child that has not improved with age. The statute's roots are grounded in pleading distinctions that existed at common law but which, in most instances, fail to coincide with the procedural categories of the Federal Rules of Criminal Procedure. Not only does the statute create uncertainty by its requirement that one analyze the nature of the decision of the District Court in order to determine whether it falls within the class of common law distinctions for which an appeal is authorized, but it has also engendered confusion over the court to which an appealable decision should be brought. [Footnotes omitted.]

Moreover, if petitioner's construction of Section 3731 were accepted, it would give the 1971 amendment the effect of cutting back substantially on the categories of rulings from which appeals are authorized, when in fact the principal purpose of the 1971 amendment was to overcome the restrictive judicial construction of the old act, which, ignoring the plain language of Section 3731, engrafted numerous limitations on the right of the United States to appeal from district court orders sustaining defenses to indictments. As the Senate Committee Report explained (S. Rep. No. 91-1296, *supra*, pp. 2-3):

> Three major problems have appeared under the Criminal Appeals Act. The first concerns the failure of the act to provide for any appeal by the Government from many frequently en-

> countered types of dismissals, and from some improper orders suppressing evidence. The second concerns the requirement under the act that an appeal in many cases be taken directly to the Supreme Court, with the result that lower court decisions which ought to be reviewed are often not appealed because they are not of sufficient general importance to warrant Supreme Court review. These problems have created serious obstacles to effective law enforcement. S. 3132, by amending the Criminal Appeals Act, will assure that the United States may appeal from the dismissal of a criminal prosecution by a district court in all cases where the Constitution permits, will permit the Government appeal from all suppression orders except those made during a trial of guilt, and will provide that * * * the appeal shall be taken first to a court of appeals.
>
> The third problem is the ambiguity and absence of settled meaning surrounding many of the statute's existing provisions, which result in a considerable and needless expenditure of prosecutive and judicial resources.

There is nothing in the detailed and comprehensive Senate Judiciary Committee Report or the debates on the bill to support petitioner's implication that Congress intended to encourage defendants to avoid raising defenses prior to trial by limiting the right of the United States to appeal post-verdict dismissals which are labeled orders in arrest of judgment.[3]

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[3] Petitioner attempts to muster legislative history supporting his position by comparing the original Senate version of the 1971 amendments with the bill ultimately enacted. The

2. Petitioner argues alternatively that the order of the district court was an acquittal, and that an appeal is barred by the double jeopardy clause. The basis of this claim is that the district court relied "in part upon evidence introduced at trial" (Pet. 9). In rejecting this claim, the court of appeals stated (Pet. App. 3–5):

> A review of the record here shows that the trial judge did not base his order on the evi-

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original Senate bill stated (S. Rept. No. 91–1296, *supra*, p. 1): "Except as otherwise expressly provided by this section, in a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment or order of a district court dismissing an indictment or information or terminating a prosecution in favor of a defendant as to any one or more counts, except that no appeal shall lie from a judgment of acquittal." After a conference between representatives of the Senate and House, the present version was agreed upon.

Petitioner argues that the deletion of the phrase "terminating a prosecution in favor of a defendant * * * except that no appeal shall lie from a judgment of acquittal" in favor of the current "except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution" evinces an intent on the part of Congress to bar appeals after a motion in arrest of judgment, because such a motion supposedly comes under the deleted provision. As the Third Circuit recently pointed out, however, while no explicit reason was given for the change (see H. Conf. Rep. No. 91–1768, 91st Cong., 2d Sess., p. 21), the most apparent reason is that the Senate version was in fact too broad in providing for appeal after any termination of a prosecution in favor of a defendant, since "double jeopardy often prohibits reprosecution after a trial begins and is terminated even though the defendant was not acquitted." *United States* v. *Pecora*, C.A. 3, No. 72–2173, decided August 31, 1973, slip op. 8, n. 6. See also *United States* v. *Jorn*, 400 U.S. 470. The change reflected in the Conference report was thus merely to confirm that the amendment was not meant to infringe upon the constitutional right against double jeopardy.

> dence adduced at trial. Jeopardy did not, therefore, attach and this appeal is not constitutionally barred. The challenged order was limited to the court's conclusion that unless adequate connection between the conduct sought to be regulated and interstate commerce is alleged and proved, prosecution under the statute is an invalid exercise of federal power. The court, in arriving at that conclusion, did not need to, and indeed did not, rely on the evidence produced by either party. The indictment contained a narrative of virtually every fact recited in the order and there was neither allegation nor proof of a connection with interstate commerce. Further, it is clear from the order that the court concluded that the fatal defect in the prosecution lay in the indictment's failure to state and the statute's failure to require a nexus with interstate commerce which would justify federal regulation. The fact that the prosecution failed to prove such a connection, though alluded to in the order, was of no significance to the actual basis for the decision. The order was neither based upon nor limited in application to the facts of the case. Appeal, therefore, is not barred by the double jeopardy clause of the fifth amendment. [Footnotes omitted.]

While we believe the court of appeals correctly concluded that in fact the district court order was based solely on "the indictment's failure to state and the statute's failure to require a nexus with interstate commerce" and cannot be labeled an acquittal, we submit that, even if the district court relied on facts adduced at trial and intended to direct an acquittal,

the double jeopardy clause would only bar a "subsequent prosecution for the same offense" (*United States* v. *Ball,* 163 U.S. 662, 671) and not an appeal, which merely seeks to compel the entry of a judgment in accordance with the verdict of guilty returned by the jury.

United States v. *Sisson,* upon which petitioner relies, is inapposite. There the district court entered a post-trial order, which it denonimated an order "in arrest of judgment," terminating the prosecution in favor of the defendant. The determination in *Sisson* that the government could not appeal from that order, because it was "in fact an acquittal," was predicated on the fact that the order of the district court was "bottomed on factual conclusions not found in the indictment but instead made on the basis of evidence adduced at trial" (399 U.S. at 288). Accordingly, it was held that the action could not be distinguished from a directed judgment of acquittal entered notwithstanding a jury verdict of guilty under Rule 29(b) of the Federal Rules of Criminal Procedure (399 U.S. at 290). Since Congress had not provided for appeals from such orders under the old Criminal Appeals Act, the appeal by the government was dismissed.

The present case is quite distinguishable from *Sisson.* Unlike *Sisson,* this is not an appeal under the old Criminal Appeals Act, which was strictly construed against the right of the government to appeal. More significantly, the holding in *Sisson,* despite some dicta in the opinion (399 U.S. at 289–290), did not rest on

the double jeopardy clause. Rather, the decision was based on a determination of the "Court's jurisdiction over the appeal under 18 U.S.C. 3731 [1964 ed.]." See *United States* v. *Jorn*, 400 U.S. 470, 478, n. 7. See also *United States* v. *Findley*, 439 F. 2d 970 (C.A. 1), cited with approval in *United States* v. *Brewster*, 408 U.S. 501, 506, where, commenting on *Sisson*, the Court of Appeals for the First Circuit stated (439 F. 2d at 973): "Collectively we believe this was an approach not in terms of double jeopardy, but in terms of the kind of error [the prior] section 3731 was intended to cover."[4]

3. While admitting that Congress has the power to regulate intrastate transactions in marijuana, heroin, amphetamines, and barbiturates, petitioner argues that there is no basis for federal regulation of intrastate cocaine transactions. As was noted long ago in *United States* v. *Darby*, 312 U.S. 100, 121, Congress may regulate "intrastate commerce * * * that all must be regulated if the interstate commerce is to be effectively controlled." See also *Perez* v. *United States*, 402 U.S.

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[4] The courts of appeals have since held (either explicitly or implicitly) that where the only relief the United States seeks on appeal is to compel the entry of a judgment of conviction in accordance with the verdict of the jury, as was the case in *Sisson*, the double jeopardy clause does not bar appellate review. *United States* v. *Weinstein*, 452 F. 2d 704, 711, n. 10, 713 (C.A. 2), certiorari denied *sub nom. Grunberger* v. *United States*, 406 U.S. 917; see also, *United States* v. *Whitted*, 454 F. 2d 642 (C.A. 8); *United States* v. *Real*, 446 F. 2d 40 (C.A. 9). The double jeopardy clause bars an appeal only where the relief sought requires "that the petitioners be tried again for the same offense" of which they were acquitted. *Fong Foo* v. *United States*, 369 U.S. 141, 143.

146. This Court recognized in *Turner* v. *United States*, 396 U.S. 398, 419, n. 39, 423, that cocaine legitimately manufactured is often the subject of theft and later illicit distribution. Thus, the findings contained in 21 U.S.C. 801 (Pet. App. 10–11), upon which Congress based the federal regulation of intrastate transactions of a multitude of drugs, must certainly be held to apply to cocaine. See *United States* v. *Lopez*, 459 F. 2d 949 (C.A. 5).[5]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[5] Cocaine is not, as petitioner implies, only a recent subject of federal regulation. 21 U.S.C. (1964 ed.) 174, repealed by the statute in the instant case (Pub. L. 91–513, 84 Stat. 1291), prohibited the sale of cocaine and other drugs illegally imported, when the seller knew them to be imported illegally, and provided that knowledge of the illegal importation was presumed from possession. This, for all intents and purposes, permitted federal regulation of local transactions in cocaine. When this presumption was rejected in *Turner*, *supra*, the current statute, based upon the federal power to regulate interstate and related intrastate commerce instead of the federal power over foreign imports, was enacted to accomplish the same ends.

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